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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DWAYNE W. HOUSTON,

Defendant and Appellant.

D053110

(Super. Ct. No. SCD210114)

APPEAL from a judgment of the Superior Court of San Diego County, Albert T. Harutunian, III, Judge. Affirmed.

A jury convicted Dwayne W. Houston of failing to register as a sex offender. (Pen. Code, §§ 290, subd. (g)(2), 290.018, subd. (b).)¹ In a separate proceeding, Houston admitted to having a prior strike conviction. (§§ 667, subds. (b)-(i), 1170.12, 668.) The trial court sentenced Houston to 32 months in state prison, consisting of the lower term of 16 months for the failing to register conviction doubled for the strike prior conviction.

Houston appeals, arguing the trial court abused its discretion by admitting

¹ All statutory references are to the Penal Code unless otherwise stated.

evidence he had a prior sex offense conviction and by allowing the prosecutor to impeach his testimony with a prior misdemeanor domestic violence conviction. We affirm the judgment.

I

Prosecution Evidence

Houston is required to register as a sex offender. In 2006, he registered with the San Diego Police Department on October 13, two days after his birthday. Betty Bixby, a detective in the police department's sex registration unit, reviewed the sex registration form with him. The form listed several obligations, including the obligation to register annually within five working days of his birthday. Houston placed his initials next to this obligation to indicate he had read and understood it. Detective Bixby also placed her initials next to this obligation to indicate she had reviewed it with Houston and confirmed he understood it. The sex registration unit's normal practice is to give a registrant a copy of the form as well as a handout containing the obligations on the form and the sex registration unit's address, telephone number, and hours of operation.

In 2007, Houston did not register within five working days of his birthday. Approximately one month after his birthday, San Diego Police Officer Luis Colon saw him at an apartment complex with two female companions. After determining he had an outstanding warrant for failing to register, Officer Colon arrested him.

Defense Evidence

Houston testified he had been registering as a sex offender for 20 years and understood he had to register within five working days of his birthday. He did not

register on time in 2007 because three men assaulted him with a billy club on the day he intended to register. His eyes were black and swollen and his back and ribs were injured. He did not go to the hospital because he did not have health insurance. Instead, he lay down on his mother's couch for three weeks. He thought about his need to register the whole time. The paper he received from the sex registration unit did not have a phone number.

The first time he left his mother's house after the assault was the day he was arrested, which was Veterans Day. He was planning to register the following day because he did not know whether the sex registration unit was open on holidays. According to him, his booking photo showed his eyes were black and swollen and he had a bump on his head when he was arrested. He admitted that in 2003 he pleaded guilty to willfully inflicting corporal injury on his girlfriend, resulting in a traumatic condition.

Houston's mother testified he was living at her home in San Diego around the time of his birthday in 2007. He came home one night bloody and beaten, with black eyes, a knot on the back of his head, and skin torn off his arm, upper lip, and nose. She called 911, but the dispatcher told her to call the police. Houston did not go to the hospital. He had difficulty walking and stayed in her house for two or two and a half weeks. By the end of the October, he left her house and she did not see him again until after he was arrested.

Houston's friend and former girlfriend, who had previously been convicted of petty theft with a prior, testified she saw him at his mother's home on his birthday in 2007. She next saw him 10 days later. He was injured and could not walk. He had a

huge black eye and a knot on his head. She helped care for him for approximately three weeks, until he could walk and no longer needed her help.

Rebuttal

After his arrest, Houston told Officer Colon he and another man had been having sex all day with two female companions. Houston did not appear to be injured to Officer Colon and he did not notice any black eyes on Houston. As part of the booking process, suspects are medically screened. If they are injured, they must be taken to a hospital. The handouts normally given to sex offender registrants include the police department's phone number and registration hours. Houston did not call in between his birthday and the date of his arrest.

II

A

Houston's obligation to register was the result of a prior conviction for forcible rape. Before trial, defense counsel moved in limine to exclude any evidence of the nature of the underlying conviction, including that it was a sex offense, arguing admission of such evidence would be inflammatory and prejudicial. Instead, defense counsel offered to stipulate simply that Houston had been previously convicted of an offense that required registration. The trial court, relying on *People v. Cajina* (2005) 127 Cal.App.4th 929 (*Cajina*), determined the jury need not be informed the conviction was for forcible rape, but must be informed the conviction was for a sex offense. Nonetheless, the trial court suggested the jury be informed the offense did not involve children. Subject to

defense counsel's objection, the parties stipulated accordingly and the trial court informed the jury of the stipulation.

Houston contends allowing the jury to learn he had a prior sex offense conviction violated his right to a fair trial. Implicitly recognizing *Cajina* required the trial court to disclose this information, Houston contends we should reject *Cajina* because it conflicts with the California Supreme Court's decision in *People v. Valentine* (1986) 42 Cal.3d 170 (*Valentine*), which he interprets to prohibit disclosure of any information about the nature of a prior felony conviction once a defendant stipulates to the fact of the conviction. We discern no conflict between *Valentine* and *Cajina*.

The California Constitution provides that, when a prior felony conviction is an element of a new felony charge, the prosecution must prove the prior felony conviction to the trier of fact in open court. (Cal. Const. art I, § 28, subd. (f)(4), former art I, § 28, subd. (f), renumbered by initiative, Gen. Elec. (Nov. 4, 2008), commonly known as Prop. 9.) In *Valentine*, the California Supreme Court considered the effect of a defendant's willingness to stipulate to ex-felon status on this provision. The Court held this provision requires the trial court to advise the jury a defendant is an ex-felon whenever a defendant's status as an ex-felon is an element of a current charge. However, if a defendant agrees to stipulate to the fact of the prior conviction, the trial court may and should exclude from evidence irrelevant information about the nature of the prior conviction. (*Valentine, supra*, 42 Cal.3d at pp. 170, 173, 177, 181-182.)

The specific charge at issue in *Valentine* was possession of a concealable firearm by an ex-felon. (*Valentine, supra*, 42 Cal.3d at p. 176.) For that charge, any prior felony,

regardless of its nature, satisfies the ex-felon element. (*Id.* at pp. 176-177.) Therefore, the Court concluded that, if the defendant stipulates to the fact of the prior felony conviction, the trial court should not provide the jury with any information about the nature of the prior felony conviction as it is "utterly irrelevant" to the charge. (*Id.* at pp. 181-182.)

As here, the specific charge at issue in *Cajina* is failing to register as a sex offender. Unlike the prior offender element at issue in *Valentine*, the prior offender element at issue in *Cajina* and in this case cannot be satisfied by any prior felony conviction. The prior offender element can only be satisfied by a prior felony conviction for an enumerated sex offense. (§ 290, subd. (c).) Consequently, unlike *Valentine*, the nature of the prior felony conviction at issue in *Cajina* and in this case is not "utterly irrelevant." Instead, the nature of the prior felony conviction is relevant to the extent necessary to establish sex offender status. Recognizing this distinction, the *Cajina* court concluded that, when a defendant charged with failing to register as a sex offender is willing to stipulate to the prior offender element, the jury need not be informed of the defendant's specific sex offense, but the jury must be informed the defendant's duty to register derives from being a sex offender. (*Cajina, supra*, 127 Cal.App.4th at pp. 933-934.)

In other words, under *Valentine* and *Cajina*, a defendant charged with failing to register as a sex offender has two alternatives. The defendant can require the prosecution to prove the qualifying sex offense conviction in open court or the defendant can stipulate to the fact of the qualifying sex offense conviction and thereby prevent the jury from

learning the specifics of the offense. (Cf. *People v. Sapp* (2003) 31 Cal.4th 240, 261.)

The defendant cannot prevent the jury from learning of the defendant's status as a sex offender. Because *Valentine* and *Cajina* do not conflict and because the trial court's ruling complied with these decisions, we conclude the trial court did not err or deprive Houston of a fair trial by allowing the jury to learn he had a prior sex offense conviction.

B

Houston next contends the trial court erred in permitting the prosecution to impeach him with a 2003 misdemeanor conviction for inflicting corporal injury on a spouse or cohabitant resulting in a traumatic condition (§ 273.5) because the conviction was not for a crime of moral turpitude. He also contends the trial court should have excluded evidence of the conviction because the evidence was substantially more prejudicial than probative. (Evid. Code, § 352.)

Regarding Houston's first contention, his trial counsel conceded the conviction involved a crime of moral turpitude.² Therefore, he may not raise this contention on appeal. (Evid. Code, § 353, subd. (a); *People v. Kipp* (2001) 26 Cal.4th 1100, 1124.)

Regarding Houston's second contention, we review a trial court's ruling concerning admissibility of evidence for abuse of discretion. (*People v. Riggs* (2008) 44 Cal.4th 248, 290.) We find no abuse of discretion in this case. The trial court properly

² Trial counsel's concession is supported by the reasoning in *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1400-1402 [felony infliction of corporal injury on a spouse or cohabitant is a crime of moral turpitude because the willingness to use force against a person with whom one is involved in a special relationship evinces a general readiness to do evil].

determined the conviction was probative of Houston's credibility because it was recent and because a person who has committed a crime of moral turpitude is inferably more likely to be dishonest than a person who has not. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295, superseded by statute on another point as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459-1460; *People v. Castro* (1985) 38 Cal.3d 301, 315.) The trial court also reasonably determined the jury was not likely to be substantially prejudiced by the prior misdemeanor conviction because, at the point the jury learned of the prior misdemeanor conviction, the jury would already know Houston had a prior felony conviction. The trial court further limited any potential prejudice by instructing the jury the conviction could only be used to evaluate Houston's honesty and for no other purpose.

Even if the trial court had abused its discretion, the error would not warrant reversal. Houston's testimony lacked inherent credibility and was contradicted by other evidence. Although he claimed he became completely incapacitated from a severe beating on the day he had planned to register, he never sought medical treatment for his injuries. In addition, although he claimed he thought about his need to register the entire time he was recuperating, he never attempted to contact the police department to explain his inability to do so. He also claimed the day of his arrest was the first day he was able to leave his mother's house; however, his mother testified he had left her house almost two weeks earlier. This latter claim is further undermined by Houston's activities and his lack of signs of incapacitating injuries on the day of his arrest. Accordingly, Houston has not shown it is reasonably probable, absent the error, he would have obtained a more

favorable verdict. (*People v. Castro, supra*, 38 Cal.3d at p. 319; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.